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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 638

JUW TEN, also known as GEORGE K. JUE, also known as JUE GAR KING, also known as CHOW KA KING,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

The petitioner, Jew Ten, also known as George K. Jue, also known as Jue Gar King, also known as Chow Ka King, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the administrative order of deportation.

OPINIONS BELOW

The decision of the Board of Immigration Appeals ordering petitioner's deportation from the United States is printed in Appendix A hereto, infra, pp. i-vi. The opinion of the Court of Appeals, printed in Appendix B hereto, infra, pp. vii-xiv, is reported in 307 F.2d 832.

JURISDICTION

Judicial review of the final order of deportation was sought under Public Law 87-301 (8 U.S.C.A. 1105a). The judgment of the Court of Appeals was filed and entered on September 8, 1962, Appendix B, infra. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Does the judicial recommendation against deportation under Section 241(b)(2), made and entered by the District Court following conviction of a criminal offense, bar petitioner's deportation based on the same criminal misconduct?

STATUTES INVOLVED

Section 241(a)(4) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(4)).

> "(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * * *
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined

therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

(13) prior to, or at the time of any entry, or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

(b) The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."[1]

[1]The last sentence was added by the Act of September 26, 1961, 75 Stat. 655, 8 U.S.C.A. 1251(b).

STATEMENT OF THE CASE

Petitioner is an alien, a native and citizen of China who was lawfully admitted to the United States in 1919, when approximately 11 years of age, as a lawful minor son of a domiciled merchant. He last entered the United States at the Port of Honolulu, the then Territory of Hawaii, on August 10, 1950, at which time he was admitted as a lawful returning permanent resident in possession of a valid reentry permit.

On February 15, 1954, petitioner was charged and convicted of a conspiracy to defraud the United States of its governmental function and right of administering the immigration laws of the United States by knowingly, wilfully and unlawfully aiding, assisting and abetting aliens to enter or try to enter the United States in violation of law. At the conclusion of the criminal proceeding, after proper notice and within the period of time prescribed by statute, the District Court, pursuant to Section 241(b)(2) of the Immigration and Nationality Act (8 U.S.C.A. 1251(b)(2)), entered an order of recommendation to the Attorney General that petitioner "be not deported".[2]

On April 3, 1954, the District Director of the Immigration and Naturalization Service issued a warrant of arrest charging that petitioner was subject to deportation under Section 241(a)(13) of the Immigration and Nationality Act (8 U.S.C.A. 1251(a)(13)), in that prior to or at the time of any entry or at any time within five years after any entry he did

[2]Said order is set forth in Appendix C, infra, pp. xv-xix.

knowingly assist, aid or abet another alien to enter or try to enter the United States in violation of law.[3]

After an extensive hearing, the Special Inquiry Officer, in a decision dated July 18, 1955, sustained the charge and directed that petitioner be deported from the United States. This decision was affirmed by the Board of Immigration Appeals on December 20, 1955, Appendix A, infra, pp. i-vi.

The deportation order is based on the same incidents and facts as developed during the course of the criminal proceeding. In substance the essential facts upon which the deportation order is predicated are the same essential facts upon which the criminal proceeding was founded.

The petition for review was filed in the Court of Appeals for the specific purpose of seeking a judicial determination as to whether the administrative decision is erroneous as a matter of law.

REASONS FOR GRANTING CERTIORARI

1. This writ of certiorari is sought because the issue presented herein raises an important and substantial question pertaining to the administration of the immigration and nationality laws of the United States. The decision below appears to be in direct conflict with other decisions of this Court.

This Court stated in *Bonetti v. Rogers*, 356 U.S. 691, when interpreting another section of the same Act, at page 699:

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[3] The warrant of arrest is set forth in Appendix D, infra, pp. xx-xxi.

"* * * we believe that our interpretation of them is the only fair and reasonable construction that their cloudy provisions will permit under the rare and novel facts of this case. 'When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of our law to resolve doubts . . . against the imposition of a harsher punishment.' Bell v. United States, 349 US 81, 83."

This Court likewise stated in the case of *Fong Haw Tan v. Phelan*, 333 U.S. 6, at page 10:

"We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, Delgadillo v. Carmichael, 332 US 388, ante, 17, 68 S. Ct. 10. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

The Court below, when considering the effect of a sentencing Court's recommendation that a convicted alien not be deported, stated:

> "But, as read and applied by some courts, § 241(b) was not free from ambiguity. The ambiguity in the scope of the application of § 241(b) resulted from first, the vague and uncertain language (here acknowledged to be so by respondent) of § 241(a)(4), and secondly, because for a number of years sentencing courts made judicial recommendations against deportation in cases where aliens were convicted of a violation of the narcotics laws—even though aliens convicted of violations of narcotics laws were specifically deportable under § 242(a)(11)." (Appendix B, infra, pp. vii-xiv, 307 F.2d 832, 834.)

The language of subsection 241(b)(2) as originally enacted in the Immigration and Nationality Act of 1952 was adopted from what was originally Section 19 of the Immigration Act of 1917, 39 Stat. 889, as amended in former Section 8 U.S.C.A. 155(a). The provisions of that part which were carried forth into the new Section 241(b) were not limited in any way whatsoever. The first limitation appears in Section 301(c) of the Narcotic Control Act of 1956 (70 Stat. 575), at which time Congress amended Section 241(b) of the Immigration and Nationality Act by adding the last sentence thereto which reads as follows:

> "'The provision of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section."

The Congressional intent of this amendment is clear from its history. In Conference Report No. 2546, the managers of the bill said:

"(3) It amended Section 241(b) of that act by including additional language to state clearly that this provision does not permit judicial recommendation against deportation of an alien convicted of a narcotic offense. Clarification of this provision has been made desirable by reason of the decisions in United States ex rel. De Luca v. O'Rourke (213 F.2d 759) and Ex Parte Robles-Rubio (119 F.Supp. 610)."

(2 U.S. Cong. News '56, p. 3321.)

The above Congressional action clearly expresses through such amendment a manifestation that the beneficial provisions of Section 241(b) shall not apply in the case of an alien subject to deportation under the provisions of subsection (11) of Section 241(a). This Congressional declaration, by the expressed exclusion of subsection (11), makes it obvious that the provisions of Section 241(b) are applicable to all other subsections of Section 241(a). If it had been the intention of Congress to specifically exclude such a judicial recommendation against deportation under subsection (13), (the subsection involved here), Congress would have so specifically stated. The maxim *expressio unius est exclusio alterius* is applicable and should be applied in interpretation of the statute involved.

For about a half a century Congress has seen fit in deportation cases to give complete recognition to the historic concept of pardons as well as providing additional relief where there has been an appropriate judicial order of recommendation against deportation.

The decisions below repudiate such judicial clemency by attacking indirectly what it can not attack directly. This construction of the statutory provisions here involved is repugnant to the announced dictates of this Court with regard to interpretation of deportation statutes.

2. The decision of the Court below in the instant case is directly in conflict with the decisions of the Court of Appeals for the Third Circuit in *United States v. Hughes,* 116 F.2d 613, and *Rasmussen v. Robinson,* 163 F.2d 732.

In *United States v. Hughes,* supra, the Court held, when considering the effect of a judicial recommendation under Section 19 of the Immigration Act of 1917, as amended, (formerly 8 U.S.C.A. 155), at page 616, that a judicial recommendation against deportation was mandatory.

In *Rasmussen v. Robinson,* 163 F.2d 732, at page 734, the Court stated that:

> "* * * the statute provides that the recommendation shall be made to the 'Attorney General.' The 'Attorney General' referred to is the Attorney General of the United States. The 'recommendation' is mandatory upon him.
>
> * * * * *
>
> "We can perceive no lack of logic in this view. Congress intended to confer and did confer upon our 'local' judges the power to recommend whether or not an alien should be deported for a crime involving moral turpitude committed within the United States. * * *"

For the reasons set forth, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
December 4, 1962.

JOSEPH S. HERTOGS,
Attorney for Petitioner.

FRED CAMPAGNOLI,
Of Counsel.

(Appendices A through D Follow)

Appendix A

Dec. 20, 1955

U. S. Department of Justice
Board of Immigration Appeals

File: A-5524011—San Francisco

In re: Jew Ten aka George K. Jue (Jue Gar King)

In Deportation Proceedings

In Behalf of Respondent: A. J. Zirpoli, Esq.
300 Montgomery Street
San Francisco, California

Charges:

Warrant: I & N Act—knowingly and for gain aided aliens to enter the United States in violation of law.

Lodged: None.

Application: That the case be remanded for a hearing de novo.

Detention Status: Released under $4,000 bond.

The respondent, a native and citizen of China, male, married, 46 years of age, appeals from an order entered by the special inquiry officer, July 18, 1955, directing his deportation on the charge stated in the warrant of arrest. Counsel in his exceptions to the order urges errors in the conduct of the proceedings in that "the findings and conclusion of law of the special inquiry officer resulted from the arbitrary abuse of discretion in the admission of a voluminous record of evidence, both oral and documentary, which

was clearly hearsay and of such character as to completely deny the alien the privilege of cross examination and a fair hearing."

The facts of the case have been fully set forth in the opinion of the special inquiry officer and need not be reiterated in their entirety. They establish that respondent originally entered the United States at the port of San Francisco, California on July 3, 1919 and was admitted as the son of a domiciled merchant. Subsequent to his original entry respondent has made numerous trips to China between 1925 and 1950. He also departed on several short trips to Mexico during World War II. Respondent last entered at the port of Honolulu, T.H. on August 10, 1950 and was admitted as a lawful returning resident alien in possession of a valid reentry permit.

The deportation of the respondent is sought under Section 241(a)(13) of the Immigration and Nationality Act of 1952 in that prior to or at the time of any entry, he knowingly and for gain encouraged, induced, assisted, abetted or aided any other alien to enter or try to enter the United States in violation of law. The record shows that respondent was convicted February 15, 1954 in the District Court of the United States for the Northern District of California, S.D. on an indictment charging in a single count that he violated Title 18 U.S.C. (Rev.) Section 371 in that he did, inter alia, knowingly conspire with divers other persons "to defraud the United States (a) of and concerning its governmental function and right of administering the immigration laws of the United

States and regulations promulgated pursuant thereto, particularly those laws and regulations governing the admission, exclusion, and registration of aliens, and their stay in the United States. . . ." (p. 3 of Ex. 115). He was sentenced to imprisonment for a period of one year and one day with a recommendation to the Attorney General that "the defendant be not deported" (Ex. 179). Under the provisions of Section 241(a)(18)(b)(2) of the Immigration and Nationality Act of 1952 a nondeportable status created by judicial recommendation is limited to deportation charges brought under Section 241(a)(4) of the same Act unless said recommendation is preserved by Section 405(a), the savings clause of the 1952 Act. *Matter of W. M.*, Int. Dec. 694, BIA, May 5, 1955. Since Section 405(a) (supra) is not applicable to the instant proceeding the judicial recommendation does not vitiate a charge laid under Section 241(a)(13) of the 1952 Act.

The substance of the case against respondent concerns his activities during May, June, July and the early part of August 1950 in connection with the operation of the China National Travel Agency of San Francisco, California with a branch office at Hong Kong, British Crown Colony. During this period the Government contends that respondent did obtain considerable monetary or other consideration in return for encouraging, inducing, assisting, abetting, or aiding other aliens to unlawfully enter the United States. As proof of the alleged unlawful acts the government relies on a transcript developed during respondent's

trial on the indictment referred to above (Exs. 4, 5 and 114), the testimony of several Chinese aliens and some 182 exhibits consisting of visa files, affidavits and other evidentiary material.

The extent of proof required to support the charge laid under Section 241(a)(13) is materially lessened by reason of respondent's conviction in the United States District Court for the Northern District of California, for violation of Title 18 U.S.C. (Rev.) Section 271. As a part of the conspiracy set forth in the indictment Specification No. 12 charges that certain named co-conspirators and other aliens whose names are to the grand jurors unknown "aided, abetted and assisted by defendant, (respondent herein) would when applying for admission to the United States evade and attempt to evade the immigration laws of the United States by appearing in Hong Kong before said Foreign Service, and in the United States before said Immigration and Naturalization Service under assumed and fictitious names, and by personating the identity of individuals other than said co-conspirators and aliens aforesaid". (See Specification No. 12, p. 7 of indictment entered as Exhibit 115). Specifications 13 through 17 are of the same tenor. Under the circumstances the additional proof required to sustain the charge laid under Section 241(a)(13) (supra) is an affirmative showing that the unlawful activity on the part of respondent as recited in the indictment was entered into "knowingly and for gain".

Respondent operated a travel agency at San Francisco, California beginning March 1948 (Ex. 181) to

at least early in 1951 (Ex. 116—LL). The record affirmatively establishes that during this period respondent had agreements with certain airlines for the sale of international and domestic transportation. The record shows that tickets purchased for aliens in Hong Kong through the China National Travel Agency via the Philippine Air Lines were issued pursuant to orders signed by the respondent. The evidence clearly establishes that these were transactions handled individually by respondent and is proven by the record of his transactions with the Philippine Air Lines. (Exs. 116 mm to uu). The evidence in our judgment establishes without doubt that during the period May to the early part of August 1950 the respondent knew that the activities in which he was engaged in connection with certain aliens desiring to come to the United States were in violation of the laws of the United States concerning the proper governmental function and administration of the United States Department of State and the Immigration and Naturalization Service.

The remaining question to be determined is whether a preponderance of the evidence establishes that respondent did obtain a monetary or other valuable consideration in return for knowingly encouraging, inducing, assisting, abetting or aiding other aliens to unlawfully enter the United States. The testimony of the aliens referred to in the stipulation entered as Exhibit 3, the testimony of the representative of the Philippine Air Lines (pp. 65-84), the testimony of the several Chinese witnesses and affidavits of record

establish to our satisfaction that respondent during the period here under consideration did receive remuneration for his unlawful activities by way of direct payments for obtaining passports and other documentation. He also realized a financial gain by way of commission on transportation sold to the aliens involved in effecting their travel to the United States. The charge stated in the warrant of arrest is sustained by the evidence of record.

Counsel urges that the hearing accorded respondent was unfair because hearsay evidence was admitted which was of such a character that respondent was completely denied the privilege of cross-examination.

This same issue arose recently in the case of *U. S. ex rel. Impastato v. O'Rourke,* 211 Fed. 2d .609, (CCA8, 1954), certiorari denied October 14, 1954. The court at p. 611 said, "In deportation hearings rules of evidence applicable in courts of law need not be followed. The admission of evidence which a court would regard as legally insufficient does not vitiate deportation proceedings". We find that the hearing accorded respondent meets the requirements set forth in Section 242(b) of the Immigration and Nationality Act of 1952. The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

Appendix B

United States Court of Appeals for the Ninth Circuit

JEW TEN, also known as GEORGE K. JUE, also known as JUE GAR KING, also known as CHOW KA KING,
Petitioner,
vs.
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

No. 17,625
Sept. 8, 1962

Petition to Review an Order of the Immigration and Naturalization Service

Before: BARNES, and KOELSCH, Circuit Judges; PLUMMER, District Judge

BARNES, Circuit Judge:

This is a petition for judicial review of a final order of deportation entered against Jew Ten (hereinafter referred to as "petitioner") by the Immigration and Naturalization Service (hereinafter referred to as "respondent") pursuant to administrative proceedings under Section 242(b) of the Immigration and Nationality Act (8 U.S.C. § 1252(b)). The petition was timely filed. Service was properly made, and the deportation was stayed. This court has jurisdiction to review the order entered below under the provisions of Section 1105a of Title 8, United States Code, and Sections 1031-1042 of Title 5, United States Code.

The question here presented is whether respondent's order is erroneous as a matter of law.

The facts are not in dispute. They may be summarized as follows: Petitioner is an alien, a native and citizen of China, who was first lawfully admitted into the United States in 1919 as the lawful minor son of a domiciled merchant. He last entered the United States at the Port of Honolulu, the then Territory of Hawaii, on August 10, 1950, at which time he was admitted as a lawful returning permanent resident in possession of a valid re-entry permit.

On February 15, 1954, petitioner was convicted of a conspiracy to assist other aliens to enter the United States in violation of the law. The district court, pursuant to the provisions of § 241(b)(2) of the Immigration and Nationality Act (8 U.S.C. § 1251(b)(2)), recommended to the Attorney General that petitioner "be not deported." This resulted in the provision of Subsection (a)(4) of § 1251 being inapplicable (conviction of a crime involving moral turpitude).

Despite this judicial recommendation, and the resulting inapplicability of § 1251(a)(4), on April 3, 1954 respondent issued a warrant of arrest charging petitioner as being deportable under § 241(a)(13)[1] of the Immigration and Nationality Act of 1952.

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[1]This Subsection, 8 U.S.C. § 1251(a)(13), reads in pertinent part:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

• • • • •

"(13) prior to or at the time of any entry, or at any time within five years after any entry shall have knowingly and

After an extensive hearing, the Special Inquiry Officer, in a decision dated July 18, 1955, sustained the charge and directed that petitioner be deported from the United States. This decision was affirmed by the Board of Immigration Appeals on December 20, 1955.

Petitioner does not set forth his specification of errors in conformity with the rules of this court. In his statement of facts, however, he says:

> "This petition for review was filed for the specific purpose of seeking a judicial determination as to whether the administrative decision is erroneous as a matter of law."

Thus, petitioner does not here assert that the record in no way supports respondent's decision; consequently, this court is not called upon to determine whether there is reasonable, substantial, or probative evidence in the record to support respondent's order.

The issue presented, in petitioner's words, is:

> "The Immigration and Naturalization Service erred in holding petitioner subject to deportation on the charge set forth in the warrant of arrest contrary to the recommendation of the District Court to the Attorney General that petitioner not be deported from the United States."

It is petitioner's contention that respondent is without jurisdiction or power to deport him because petitioner is entitled to the benefit of the district court's

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for gain encouraged, induced, assisted, abetted or aided any other alien to enter or try to enter the United States in violation of law."

recommendation that he not be deported. The district court's recommendation was founded upon § 241(b) of the Immigration and Nationality Act of 1952, which, prior to enactment of the Narcotics Control Act of 1956, read:

> "(b) The provisions of subsection (a)(4) respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crimes shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, shall be granted an opportunity to make representations in the matter."

As one reads § 241(b), it seems fairly clear that the power of the sentencing court to recommend that a convicted alien not be deported is limited to those cases where an alien is convicted of an offense within the meaning of § 241(a)(4)[2] of the Act (8 U.S.C.

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[2]This section reads:

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

• • • •

"(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective

§ 1251(a)(4)). But, as read and applied by some courts, § 241(b) was not free from ambiguity. The ambiguity in the scope of the application of § 241(b) resulted from first, the vague and uncertain language (here acknowledged to be so by respondent) of § 241(a)(4), and secondly, because for a number of years sentencing courts made judicial recommendations against deportation in cases where aliens were convicted of a violation of the narcotics laws[3]—even though aliens convicted of violations of narcotics laws were specifically deportable under § 242(a)(11).

With this brief background in mind, suffice it to say that Congress was not happy with the interpretation given § 241 by the courts. Consequently, by § 301(c) of the Narcotics Control Act of 1956 (70 Stat. 575) Congress amended § 241(b) by adding the following sentence:

"The provisions of this subsection shall not apply in the case of any alien who is charged with

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institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

[3]This is pointed up in footnote 5 in *Ex Parte Robles-Rubio*, N.D.Calif. 1954, 119 F.Supp. 610, at page 613, which reads:

"5. Since 1922, when violation of the Jones-Miller Act was first made a deportable offense, the courts have possessed the power to recommend against the deportation of an alien convicted of violating that narcotic statute. . . . And, when, in 1931, the violation of other narcotic statutes, including the Harrison Narcotics Act, was made a deportable offense, the power of the courts to recommend against deportation was made applicable to violators of these statutes. . . . Thus for 30 years prior to the passage of the Immigration and Nationality Act of 1952, the courts have been making recommendations against deportation in narcotic cases."

being deportable from the United States under subsection (a)(11) of this section."

The congressional intent of this amendment is clear from its history. In Conference Report No. 2546, the managers of the bill said:

"(3) It amended section 241(b) of that act by including additional language to state clearly that this provision does not permit judicial recommendation against deportation of an alien convicted of a narcotic offense. Clarification of this provision has been made desirable by reason of the decisions in United States ex rel. De Luca v. O'Rourke (213 F.3d 759) and Ex Parte Robles-Rubio (119 F.Supp. 610)." (2 U.S. Cong. News '56, p. 3321.)

The 1956 amendment to § 241(b) is the basis for petitioner's contention in the case at bar. This amendment, contends petitioner, directly or indirectly amends § 241(b) to mean that judicial recommendations can now be made in all those classes of deportability enumerated in § 241(a) except when the deportation is ordered under § 241(a)(11).

This contention, we believe, to be untenable. While the intent of Congress may be clearer in the statute's legislative history than it is in the language of the statute itself, we do not believe § 241(b) can be given the meaning contended for by petitioner. As we read § 241(b), taking cognizance of its history, it can only mean that the sentencing court is limited to making recommendations in § 241(a)(4) convictions.

This brings us to the case at bar. The district court here recommended that petitioner not be deported. Does this recommendation render respondent powerless—or without jurisdiction—to deport petitioner? For the reasons stated above, the answer would depend upon whether the case at bar was a proceeding to deport petitioner under § 241(a)(4). It was not. Hence, the district court's recommendation does not bar respondent from deporting petitioner, and respondent's final order of deportation must be affirmed.

Respondent did *not* charge petitioner as being deportable under § 241(a)(4); nor was § 241(a)(4) relied upon by respondent in the proceedings below. Respondent *did* charge and find a violation of § 241(a)(13).[1] In other words, respondent charged peti-

[1]The opinion of the Board of Immigration Appeals reads:

"The deportation of the [petitioner] is sought under Section 241(a)(13) . . . in that prior to or at the time of any entry, he knowingly and for gain encouraged, induced, assisted, abetted or aided any other alien to enter or try to enter the United States in violation of law. . . . Under [Section 241(b)] a nondeportable status created by judicial recommendation is limited to deportation charges brought under Section 241(a)(4) . . . unless said recommendation is preserved by . . . the saving clause of the 1952 Act. Since [the saving clause] is not applicable to the instant proceeding the judicial recommendation does not vitiate a charge laid under Section 241(a)(13). . . .

". . . As proof of the alleged unlawful acts the Government relies on a transcript developed during [petitioner's] trial on the indictment referred to above (Exs. 4, 5 and 114), the testimony of several Chinese aliens and some 182 exhibits consisting of visa files, affidavits and other evidentiary material.

"The extent of proof required to support the charges laid under Section 241(a)(13) is materially lessened by reason of [petitioner's] conviction in the United States District Court . . . for violation of Title 18 U.S.C. (Rev.) Section 271. . . ."

tioner as being deportable under § 241(a)(13) because he had committed acts proscribed under that section; not with being deportable for the reason that he had been convicted of a crime within the purview of § 241(a)(4). As pointed out in marginal note 4, *supra*, the only significance attached to petitioner's conviction in the proceedings below was that the conviction had made it easier for respondent to prove that petitioner did in fact commit acts proscribed by § 241 (a)(13). And, though it is not required, a reading of the record shows that respondent's decision was well founded in fact.

Affirmed.

(Endorsed) Opinion Filed Sept. 8, 1962.

Frank H. Schmid, Clerk.

The sole Conclusion of Law reached by the Special Inquiry Officer reads:

> "1. That under Section 241(a)(13) . . . the [petitioner] is subject to deportation on the ground that prior to or at the time of any entry, he shall have knowingly and for gain encouraged, induced, assisted, abetted or aided any other alien to enter or try to enter the United States in violation of law."

Appendix C

(Endorsed):
Filed (on return)
Feb 25 1954
C. W. Calbreath, Clerk.

(Endorsed):
Received ___ o'clock ___ M
Feb 16 1954
U.S. Marshal's Office
San Francisco, Calif.
Crim. No.

District Court of the United States
for
Northern District of California
Southern Division

No. 33654

UNITED STATES OF AMERICA
vs.
GEORGE K. JUE

JUDGMENT AND COMMITMENT

On this 15th day of February, 1954 came the attorney for the government and the defendant appeared in person and with counsel.

The defendant having plead not guilty and a verdict of guilty having been returned by the jury on February 5th, 1954, of a violation of *Title 18 U.S.C. (Rev.) Sec. 371*—(Conspiracy to defraud the United

States of and concerning its governmental function and right of administering the immigration laws of the United States) as charged in the indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR and ONE (1) DAY and further, it is recommended to the Attorney General that the defendant be not deported.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ O. D. Hamlin,
United States District Judge.

Examined by:
/s/ James B. Schnake
Assistant U.S. Attorney
(Initialed) A.B.D.

The Court recommends commitment to an institution to be designated by U.S. Attorney General.

Judgment and Commitment filed this 16th day of February, 1954.

(Seal)

/s/ C. W. Calbreath,
Clerk.
/s/ A. B. Diepenbrock,
Deputy Clerk.

A True Copy. Certified this 16th day of February, 1954.

(Signed) C. W. Calbreath,
Clerk.

(By) Marguerite Ellis,
Deputy Clerk.

M.E.

(U.S. Marshal's Return on Reverse Side of Page)

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on February 15, 1954 to San Francisco County Jail.

Defendant delivered on February 19th, 1954 to Federal Prison Camp at Florence, Arizona, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

Frank O. Bell,
United States Marshal.
by: /s/ Charles J. Pomer,
Deputy.

Certified Copy

United States of America
Northern District of California—ss:

I, C. W. Calbreath, Clerk of the United States District Court in and for the Northern District of California, do hereby certify that the annexed and foregoing is a true and full copy of the original Judgment and Commitment dated February 15, 1954, in the case of United States of America v. George K. Jue,—Crim. Case No. 33654, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at San Francisco, California, this 24th day of November, A.D. 1954.

(Seal)

C. W. Calbreath,
Clerk.
By /s/ Marguerite Ellis,
Deputy Clerk.

M.E.

Appendix D

WARRANT

FOR ARREST OF ALIEN

United States of America
Department of Justice
Immigration and Naturalization Service
San Francisco, California

No. A-5524011, 1300-58600

To Immigration Officer E. T. Prather

Or to any officer in the service of the United States Immigration and Naturalization Service

WHEREAS, from evidence submitted to me, it appears that the alien JEW TEN aka GEORGE K JUE who entered this country at Honolulu, T.H. on P.A.L. the 10th day of August, 1950 has been found in the United States in violation of the immigration laws thereof, and subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit:

Section 241 (a)(13) of the Immigration and Nationality Act, in that, prior to entry he has knowingly and for gain, encouraged, induced, assisted, abetted or aided any other alien to enter or to try to enter the United States in violation of law.

Section 241(a)(13) of the Immigration and Nationality Act, in that, at the time of entry he has knowingly and for gain, encouraged, induced, assisted,

abetted or aided any other alien to enter or to try to enter the United States in violation of law.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1954."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 15th day of February, 1954.

(Seal) /s/ Bruce G. Barber

Bruce G. Barber, District Director
San Francisco District

Office at San Francisco, Calif.
Date Feb 15 1954

WARRANT FOR ARREST OF
JEW TEN AKA GEORGE K. JUE

Served by me at San Francisco, Calif., on Feb. 15, 1954 at 12:55 p.m. Alien was then informed as to cause of arrest, the conditions of release, advised as to right of counsel and furnished with a copy of this warrant.

E. T. Prather, Investigator.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 638

JEW TEN, ALSO KNOWN AS GEORGE K. JUE, ALSO KNOWN AS JUE GAR KING, ALSO KNOWN AS CHOW KA KING, PETITIONER,

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-14) is reported at 307 F.2d 832.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1962 (Pet. App. 7, 14). The petition for a writ of certiorari was filed on December 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 241(b) of the Immigration and Nationality Act provides that, where a judicial recommendation against deportation is made, the provisions of Section 241(a)(4), making convictions for crimes involving moral turpitude a ground of deportation, shall not apply. Section 241(a)(13) makes an independent basis for deportation the fact that an alien knowingly and for gain assists other aliens unlawfully to enter the United States. The question presented is whether a recommendation against deportation by the district court following petitioner's conviction for conspiring to smuggle aliens into the United States bars petitioner's deportation under section 241(a)(13) on an independent finding based on evidence that he committed the acts specified in that subsection.

STATUTES INVOLVED

Section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 889-890, 8 U.S.C. (1940 ed.) 155(a), provided in pertinent part:

> That * * * except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude, committed at any time after entry; * * * any

alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude; * * * shall upon the warrant of the Secretary of Labor, be taken into custody and deported; * * * *Provided further*, That the provisions of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act * * *.

Section 20, Chapter 439 of the Act of June 28, 1940, 54 Stat. 670, 671-672, 8 U.S.C. (1940 ed.) 155(b), which amended section 19 of the Immigration Act of February 5, 1917, 39 Stat. 874, 8 U.S.C. (1940 ed.) 155(a), provided in pertinent part:

> Any alien of any of the classes specified in this subsection, in addition to aliens who are deportable under other provisions of law, shall, upon warrant of the Attorney General, be taken into custody and deported:
>
> (1) Any alien who, at any time within five years after entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or

aided any other alien to enter or to try to enter the United States in violation of law.

(2) Any alien who, at any time after entry, shall have on more than one occasion, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien or aliens to enter or to try to enter the United States in violation of law.

* * * * *

Section 241 of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. 1251, provides in pertinent part:

(a) Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—

* * * * *

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;

* * * * *

(13) prior to, or at the time of any entry or at any time within five years after any entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law;

* * * * *

(b) The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States, or (2) if the court sentencing such alien for such crime shall make, at the time of first imposing judgment or passing sentence * * * a recommendation to the Attorney General that such alien not be deported * * *. The provisions of this subsection shall not apply in the case of any alien who is charged with being deportable from the United States under subsection (a)(11) of this section.

STATEMENT

Petitioner is an alien, a native and citizen of China, who was first admitted to the United States at the port of San Francisco, California, in 1919, as the lawful minor son of a domiciled merchant (I.R. 2, 57, 61).[1] He last entered the United States on August

[1] The proceedings before the Immigration and Naturalization Service are contained in six volumes, five of which contain consecutively numbered exhibits introduced at the deportation hearing.

10, 1950, at the port of Honolulu, Hawaii, as a returning permanent resident of the United States (I.R. 2, 61).

In 1954, petitioner was convicted in the United States District Court for the Northern District of California for conspiring with others from 1948 to 1953 to defraud the United States by assisting other aliens to enter the United States in violation of law (Tr. 2049; Pet. App. 15-16). On February 15, 1954, the court sentenced petitioner to imprisonment for a year and a day (Tr. 2069; Pet. App. 15-16). The following proceedings transpired (Tr. 2069-2073):

> Mr. ZIRPOLI [Counsel for petitioner]: Your Honor, may I also at this time, pursuant to the motion which I have heretofore filed, ask the Court to consider a recommendation that the defendant not be deported. * * *
>
> Mr. COLLINS [Counsel for the Immigration and Naturalization Service]: * * * [The Immigration and Naturalization Service] also wanted me to point out to Your Honor that Mr. Fue is subject to deportation under the two sub-sections of 8 U.S.C. 1251: 1251(a)(4) with which your Honor is concerned, and 1251(a)(13), which Your Honor's recommendation would in no way affect. * * *
>
> As I understand the statute, Your Honor's rec-

The exhibits are referred to as "Ex." along with the appropriate exhibit number. The sixth volume contains the proceedings before the Special Inquiry Officer and the Board of Immigration Appeals and is referred to as "I.R." The reporter's transcript of petitioner's 1954 criminal trial and related proceedings in the district court is contained in nineteen consecutively paginated volumes and is referred to as "Tr."

ommendation goes only to 1251(a)(4), conviction of a crime involving moral turpitude with a sentence of one year or over. As far as the mechanics of deportation, it would be much simpler for the Attorney General under 1251(a)(4), because the production of the judgment of this Court would be substantially all that would be required in the matter of proof.

Mr. ZIRPOLI: * * * I am cognizant of both of the provisions, and of course I respectfully submit that the only matter with relation to which Your Honor would have jurisdiction to act, of course, pertains to sub-section (4), and, therefore, the recommendation which Your Honor could make to the Attorney General would be a recommendation that he not be deported because of conviction of a crime involving moral turpitude.

And I am cognizant of Section (13), and that is of course the primary reason why I as earnestly as I can beseech the Court to make such a recommendation, because at least under Section (13) I have fighting chance for this man, and considering his past life and considering what I previously indicated to the Court, the constructive good that he has actually done in this community, I feel that it would not be wrong * * * to give him that fighting chance. And that is why I am earnestly begging the Court to recommend that he not be deported.

The COURT: * * * I believe that the Court is amply justified in recommending to the Attorney

> General that he not be deported, and that will be the recommendation that will accompany the defendant. . . .

The formal judgment, in addition to imposing sentence of a year and a day, "recommended to the Attorney General that the defendant be not deported" (Ex. 179; Pet. App. 16).

On February 15, 1954, the Immigration and Naturalization Service issued a warrant for petitioner's arrest and deportation on the ground that prior to and at the time of his entry into the United States he had knowingly and for gain encouraged and assisted other aliens to enter or try to enter the United States unlawfully, in violation of Section 241(a)(13) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1251(a)(13), *supra* (I.R. 38-39; Pet. App. 20-21). A deportation hearing was conducted before a Special Inquiry Officer in San Francisco in May 1954 at which the transcript of petitioner's trial and other evidence was adduced (I.R. 63-330). On July 18, 1955, the Special Inquiry Officer found the petitioner "clearly deportable" on the grounds contained in the arrest warrant and ordered his deportation from the United States (I.R. 38-62). On December 20, 1955, the Board of Immigration Appeals dismissed the appeal (I.R. 2-5; Pet. App. 1-6), and petitioner was subsequently ordered deported to the Nationalist Republic of China (Formosa). On petition for review to the court of appeals pursuant to 8 U.S.C. (Supp. III) 1105a, the deportation order was affirmed (Pet. App. 7-14).

ARGUMENT

Petitioner contends (Pet. 5-9) that the judicial recommendation against deportation received under section 241(b) of the Immigration and Nationality Act of 1952, *supra*, operates to bar his deportation under section 241(a)(13) of the Act. He argues that section 241(b) was without limitation from the time of its initial enactment as part of the Immigration Act of 1917, *supra*, until passage of the Narcotic Control Act of 1956, at which time Congress added the last sentence of subsection (b) to make the subsection inoperative in those cases where aliens were charged with being deportable for drug addiction and narcotic offenses, and that by the 1956 Amendment Congress made it "obvious that the provisions of Section 241(b) are applicable to all other subsections of Section 241(a)". The short answer is that section 241(b) is specifically limited to relieving an alien from deportation on the grounds of conviction of a crime involving moral turpitude under section 241(a)(4), and has been so limited from the time of its initial inclusion in section 19 of the Immigration Act of 1917.

Section 241(b) provides that "(t)he provisions of subsection (a)(4) *of this section respecting the deportation of an alien convicted of a crime or crimes* shall not apply * * * if the court sentencing *such alien for such crime* shall make, at the time of first imposing judgment or passing sentence * * * * a recommendation to the Attorney General that such alien not be deported." (Emphasis supplied). Thus its application is in terms limited to the ground of deportation set forth in 241

(a)(4), *i.e.*, conviction of crimes involving moral turpitude. This was expressly recognized by the petitioner at the time the court recommended that he not be deported. See the Statement, *supra*, p. 7. Petitioner was not, however, ordered deported on the basis of his conviction of a crime. He was ordered deported because it was found as a fact that, within five years after an entry into the United States, he knowingly and for gain encouraged and assisted other aliens unlawfully to enter the United States. This fact was independently proved by the evidence and was not based on the mere fact of criminal conviction. Since the order of deportation did not rest upon grounds specified in subdivision (a)(4), the judicial recommendation against deportation had no application to petitioner's case. See *Lopez-Blanco* v. *Immigration and Naturalization Service*, 302 F. 2d 553 (C.A. 7).

The history of Section 241(b) confirms its explicit wording in restricting its application to deportations ordered on the grounds of conviction of a crime of moral turpitude. The first predecessor of Section 241(b), Section 19 of the Immigration Act of 1917, *supra*, pp. 2-3, stated explicitly that the provisions of the Act making conviction of a crime of moral turpitude grounds for deportation should not be applied if the sentencing judge recommended that the alien not be deported. The first provision dealing with deportation for assisting other aliens in entering the United States in violation of law was enacted twenty-three years later as Section 155(b) of an Act of June 28, 1940. Section 19 of the Immigration Act of 1917 was, at that time, maintained in effect without any significant change.

Section 241 of the Immigration and Nationality Act of 1952, the present statute, merely changed the wording of the provision in Section 19 of the 1917 statute by referring to "the provisions of subsection (a)(4)", dealing with deportation for commission of a crime of moral turpitude, rather than restating the substance of subsection (a)(4).

Petitioner's reliance on Section 301(*c*) of the Narcotic Control Act of 1956, 70 Stat. 567, 575, is misplaced. That section merely provided that Section 241(b) should not apply in the case of aliens "charged with being deportable from the United States under subsection (a)(11)" of Section 241 (*i.e.*, drug addiction and narcotic offenses). The amendment was enacted to clarify subsection (b) because at least two courts had held that a judicial recommendation against deportation would operate to bar deportation on the basis of a narcotic conviction although such a conviction furnished an independent ground for deportation under subsection (a)(11) of the Immigration Act of 1952 as well as a basis for deportation under subsection (a)(4), to which provision alone Section 241(b) referred. See S. Rep. No. 1997, 84th Cong., 2d Sess. at 21; Conf. Rep. No. 2546, 84th Cong., 2d Sess. Congress plainly did not intend, by negative implication and without any discussion, to extend broadly the scope of the provisions regarding judicial recommendations which had remained in the law, substantially unchanged, for almost forty years. Indeed, the source of confusion which caused the 1956 amendment—the fact that both subsections (a)(4) and (a)(11) made a *conviction* itself the basis for deportation—is not even present in a case

such as this one where *proscribed conduct* and not a criminal conviction is the grounds of deportation.

There is no conflict among the circuits. Neither *Rasmussen* v. *Robinson*, 163 F. 2d 732 (C.A. 3), nor *United States ex rel. Santarelli* v. *Hughes*, 116 F. 2d 613 (C.A. 3), the cases relied upon by petitioner to establish a conflict, has any bearing upon the issues decided by the court below, for in each of the cited cases the ground for deportation was conviction of a crime of moral turpitude.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
RICHARD W. SCHMUDE,
Attorneys.

JANUARY 1963.